No. 42520-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Wayne Burdette,

Appellant.

Lewis County Superior Court Cause No. 11-1-00422-2

The Honorable Judges James Lawler and Richard Brosey

Appellant's Opening Brief

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge consulted with counsel in chambers to select the jury instructions that guided the jury's deliberations, and to answer a jury question. Did the trial judge violate the constitutional requirement that criminal trials be open and public by closing the courtroom without first conducting any portion of a *Bone-Club* analysis?

2. An accused person has the constitutional right to be present at all critical stages of trial. In this case, the court met with counsel in chambers to answer jury questions. Did the trial judge violate Mr. Burdette's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?

3. It is unlawful for police to make a warrantless entry into a residence, absent some exception to the warrant clause. In this case, police arrested Mr. Burdette outside his residence, secured him, and then walked through his home. Did the police violate Mr. Burdette's Fourth Amendment right to be free from unreasonable searches and seizures and his right to privacy under Article I, Section 7?

4. A search warrant may not be based on information unlawfully obtained. In this case, the warrant was based in part on information obtained from the illegal warrantless entry into Mr. Burdette's residence. When information derived from the illegal entry is excised from the affidavit, is the affidavit insufficient to establish probable cause?

5. A search warrant may not issue in the absence of probable cause to believe that evidence of a crime will be found in the place to be searched. Here, the search warrant affidavit did not provide any facts suggesting that evidence of any crime would be found at Mr. Burdette's home. Was the search warrant issued in the absence of probable cause?

6. A search warrant is overbroad if it authorizes seizure of items for which probable cause does not exist, or if it fails to describe the things to be seized with sufficient particularity. In this case, the search warrant was overbroad for both reasons. Must any evidence derived from execution of the overbroad search warrant be suppressed?

7. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Burdette's defense attorney failed to argue all available grounds for suppression of the evidence. If Mr. Burdette's suppression arguments are not preserved for review, was he denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Wayne Burdette was driving in Mossyrock, Lewis County, in the late evening on June 10, 2011. RP (8/18/11) 46, 129. Officer Stamper, the only police officer for the town, saw him and believed he was speeding. RP (8/18/11) 60-63. He pulled Mr. Burdette over. RP (8/18/11) 66-67.

Mr. Burdette did not think he should have been stopped, and came across as argumentative to Stamper. RP (8/18/11) 70, 130-133. While Stamper was in his car checking on the information he'd obtained from Mr. Burdette, Mr. Burdette got out of his car and walked up to the officer. RP (8/18/11) 72, 133. He wanted to see the radar readout before the officer cleared it. RP (8/18/11) 75, 133-134, 155.

Stamper received an "officer safety flag" code through dispatch, so he got out of his car with his gun drawn and pointed at Mr. Burdette. RP (8/18/11) 71-72. He commanded Mr. Burdette to return to his car, which Mr. Burdette eventually did. RP (8/18/11) 72-78, 135. Stamper feared that Mr. Burdette would try to kill him. RP (8/18/11) 73, 75.

Trooper Hicks arrived, and both officers approached Mr. Burdette's vehicle. RP (8/18/11) 79. Hicks saw a gun in Mr. Burdette's back waistband, and they pulled him from the car and arrested him. RP

(8/18/11) 80-82, 101, 107. Mr. Burdette had a concealed weapons permit, which the officers retrieved and viewed. RP (8/18/11) 105, 129, 136.

Deputy Riordan requested a search warrant for Mr. Burdette's home. In it, he alleged that Mr. Burdette had been assaultive to police officers in the past. Ex. 2 (admitted 7/27/11). But this was not correct: in later testimony, Riordan acknowledged that he had misquoted another, and that Mr. Burdette was not actually known to assault police. RP (7/27/11) 12-13. In fact, the only conviction information Riordan knew when he completed the application for Mr. Burdette was a misdemeanor offense. RP (7/27/11) 13. He also stated that when they went to the trailer to arrest Mr. Burdette, which they accomplished in a grassy area just outside the trailer, an officer went inside the trailer and saw firearms. Ex. 2 (admitted 7/27/11).

The court authorized the warrant, and law enforcement searched Mr. Burdette's home. They seized written materials from the home which showed that the unidentified writer had a lack of regard for authority in general, and law enforcement specifically. RP (8/18/11) 143.

Mr. Burdette was charged with Obstructing and felony Harassment, which included the special allegations that he was armed with a firearm, and that the crime was against a law enforcement officer. CP 1-2.

Mr. Burdette challenged the search warrant for his home. He argued that the information that provided the basis for the warrant was incorrect, and that the warrant lacked probable cause. RP (7/27/11) 14-19; Motion to Suppress, Supp. CP. The court denied the suppression motion. RP (7/27/11) 22-23.

At trial, the prosecutor agreed not to offer at trial any items seized from Mr. Burdette's residence. RP (8/17/11) 13. The prosecutor later sought to cross examine Mr. Burdette regarding some of the items, but the court sustained an objection. RP (8/18/11) 139-147.

Before jury selection, the court directed the attorneys to meet with him in his chambers. RP (8/17/11) 22. After all of the evidence was submitted, the judge again took the attorneys into chambers to discuss jury instructions. RP (8/19/11) 2. Neither meeting was made part of the record.

The jury sent out two separate questions. Without addressing either in open court, the judge sent back a written reply each time. Both were written on a form indicating that the court's answer was provided "after affording all counsel/parties opportunity to be heard." Inquiry from Jury and Court's Response (two), Supp. CP.

The jury acquitted Mr. Burdette of all but a single count, Obstructing. RP (8/19/11) 50-55.

At sentencing, the state used items seized from Mr. Burdette's home to argue for the maximum sentence of a year in jail. RP (8/23/11) 61-66; Ex. 1-4 (admitted 8/23/11). The court issued a sentence of one year in jail. CP 4-6.

Mr. Burdette timely appealed. CP 6-10.

ARGUMENT

I. THE TRIAL COURT VIOLATED BOTH MR. BURDETTE'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.,* 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge,* 161 Wash.App. 568, ___, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id, at* ___.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club,* 128 Wash.2d 254, 259,

906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club, at* 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club, at* 261-262, 257.[1] In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., *at* 724-725.

The public trial right ensures that an accused person "is fairly dealt with and not unjustly condemned." *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode,* 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*,

[1] *See also State v. Strode,* 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman,* 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strode, at* 230.[2]

C. The trial court violated the public trial requirement by meeting with counsel in chambers to discuss pretrial matters, to select the appropriate jury instructions, and to discuss and answer jury questions.

In this case, the record reflects that three separate matters were heard *in camera*. First, the court addressed pretrial matters in chambers the morning after the commencement of trial.[3] RP (8/17/11) 22. Second, the court and the attorneys met in chambers to discuss and select the appropriate jury instructions. RP (8/19/11) 2. Third, the court answered two jury questions "after affording all parties/counsel opportunity to be heard," without bringing the matter into open court. Inquiry from Jury and Court's Response (two), Supp. CP.

These *in camera* proceedings, conducted outside the public's eye without the required analysis and findings, violated Mr. Burdette's constitutional right to an open and public trial. U.S. Const. Amend. VI,

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[2]"This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'" (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

[3] Trial commences when the case is called and preliminary motions are heard. *See, e.g., State v. Vermillion*, 112 Wash.App. 844, 856, 51 P.3d 188 (2002).

U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra.* They also violated the public's right to an open trial. *Id.* Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The public trial right "applies to all judicial proceedings." *Momah, at* 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strode, at* 230.[4]

The Court of Appeals has held that the public trial right only extends to evidentiary hearings. *See, e.g., State v. Sublett,* 156 Wash.App. 160, 181, 231 P.3d 231, *review granted,* 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. *Momah, at* 148; *Strode, at* 230.

[4] ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

II. THE TRIAL JUDGE VIOLATED MR. BURDETTE'S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at* 702.

B. An accused person has a constitutional right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from the Sixth Amendment's confrontation clause and from the Fourteenth Amendment's due process clause. *Gagnon, at 526.* Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *United States v. Tureseo*,

566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

C. Mr. Burdette's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

In this case, Mr. Burdette was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. The second question did not relate merely to a point of law: the jury announced that it was deadlocked "over several issues relating to the defendant's intent." Inquiry from Jury and Court's Response (second), Supp. CP. Mr. Burdette should have had the opportunity to be present when the decision was made to instruct jurors to continue deliberating.

The court's decision to answer the question in Mr. Burdette's absence, with instructions to continue deliberating "in an effort to reach verdicts" violated his Fourteenth Amendment right to be present. *Gagnon, supra.* His conviction must be reversed and the case remanded for a new trial. *Id.*

III. THE WARRANTLESS ENTRY INTO MR. BURDETTE'S RESIDENCE VIOLATED THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

D. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at702*. The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008).

E. Warrantless searches are presumed to be unconstitutional.

Under the Fourth Amendment to the U.S. Constitution,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.[5]

Similarly, Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. It is "axiomatic" that Article I, Section 7 provides stronger protection to an individual's right to privacy than that guaranteed by the Fourth

[5] The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Amendment to the U.S. Constitution.[6] *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches and seizures conducted without authority of a search warrant "'are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant,* 556 U.S. 332, ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt,* 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

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[6] Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

Article I, Section 7 explicitly guards the home against invasion without authority of law. Wash. Const. Article I, Section 7. Under this provision, "the home enjoys a special protection." *State v. Schultz*, 170 Wash.2d 746, 753, 248 P.3d 484 (2011). The closer officers come to intrusion into a dwelling, the greater the constitutional protection. *Id.*

F. The warrantless entry and search of Mr. Burdette's home violated the Fourth Amendment and Wash. Const. Article I, Section 7.

Under the Fourth Amendment, police may not perform a protective sweep of a residence following arrest outside the residence unless the officers have a specific, reasonable basis for believing that someone inside the residence poses a continuing danger. *United States v. Colbert*, 76 F.3d 773, 776 (6th Cir. 1996); *see also United States v. Lawlor*, 406 F.3d 37, 42 (1st Cir. 2005). Only Division III has issued a published opinion upholding—under Article I, Section 7—a warrantless entry for a protective sweep. *State v. Smith*, 137 Wash.App. 262, 153 P.3d 199 (2007).[7] *Smith* applied a standard similar to that used under the federal constitution. *Id.*

Here, the officers lacked any specific information providing a reasonable basis to believe that someone inside Mr. Burdette's trailer

[7] In *Smith,* the court also found the entry justified under the exigent circumstances and community caretaking functions. *Smith, at* 268-270.

posed a continuing danger after Mr. Burdette had been secured. Nothing in the record suggests that others were present, or that something in the home posed a danger to the officers or the community. Ex. 2 (admitted 7/27/11). Thus the warrantless entry was not justified under the federal standard. *Colbert, at* 776. Likewise, assuming Article I, Section 7 permits warrantless entry for the reasons articulated in *Smith,*[8] the facts here do not support the entry in this case. *Smith, at* 268.

Accordingly, the evidence obtained during the initial warrantless entry should not have been used at Mr. Burdette's sentencing hearing.

G. The search warrant was tainted by the initial unlawful entry.

Any evidence tainted by an illegal search or seizure must also be suppressed as "fruit of the poisonous tree." *Eisfeldt, at* 640-641 (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Where illegally obtained information is used to support a search warrant, the warrant affidavit must be redacted to exclude the unlawfully obtained evidence:

> The court must view the warrant without the illegally gathered information to determine if the remaining facts present probable cause to support the search warrant…If the warrant, viewed in this light, fails for lack of probable cause, the evidence seized pursuant to that warrant must also be excluded.

[8] The *Smith* court did not engage in any analysis to determine whether or not Article I, Section 7 provides greater protection than the Fourth Amendment in this context.

Eisfeldt, at 640 (citations omitted).

The affidavit in this case included information illegally obtained during the initial warrantless entry. Accordingly, those facts obtained following entry must be excised, and the affidavit evaluated "to determine if the remaining facts present probable cause." *Eisfeldt, at* 640. *Id.*

With the information obtained after entry excised, the search warrant affidavit does not provide probable cause. Nothing in the affidavit established that evidence of any crime would be found at Mr. Burdette's residence. The evidence should have been suppressed.

Mr. Burdette's sentence must be vacated, and the case remanded for a new sentencing hearing, with instructions to exclude the items seized from his home. If Mr. Burdette's conviction is reversed and he is retried, the evidence may not be admitted at his retrial.

IV. THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF A CRIME WOULD BE FOUND AT MR. BURDETTE'S RESIDENCE.

A. Standard of Review

Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed *de novo*. *State v. Garcia-Salgado*, 170 Wash.2d 176, 183, 240 P.3d 153 (2010); *State v. Reep,* 161 Wash.2d 808, 813, 167 P.3d 1156 (2007).

B. A search warrant must be based on probable cause and describe the things to be seized with particularity.

Under the state and federal constitutions, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). An affidavit in support of a search warrant "must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young, at* 195; *Thein, at* 140.

A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers' discretion to those items for which probable cause exist, and to inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wash.2d 22, 27-29, 846 P.2d 1365 (1993).

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone,* 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to

describe the things to be seized with sufficient particularity.[9] *State v. Maddox,* 116 Wash.App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia, Perrone, supra,* and *Riley, supra*).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *Perrone at* 547. In keeping with this principle, the particularity requirement "is to be accorded the most scrupulous exactitude" when the materials to be seized are protected by the First Amendment. *Stanford, at* 485.

C. The search warrant in this case failed the probable cause and particularity requirements.

In this case, the redacted affidavit[10] did not establish probable cause to believe that evidence of any crime would be found at Mr. Burdette's residence. Unlike crimes involving drugs, guns, or other

[9] One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone, at* 545. The requirement also prevents law enforcement officials from engaging in a "'general, exploratory rummaging in a person's belongings…'" *Perrone, at* 545 (citations omitted). Conformity with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone, at* 546.

[10] The judge excised portions of the affidavit that were untrue. RP (7/27/11) 22.

tangible objects, an alleged harassment incident does not imply the existence of physical evidence. Nor were there any specific details suggesting the existence of physical evidence in this case. Even if there had been, the prosecution presented no facts suggesting that such evidence might be found at Mr. Burdette's home. Ex. 2 (admitted 7/27/11).

Even the shotgun seized following the initial illegal entry was not evidence of a crime.[11] Mr. Burdette was lawfully permitted to possess firearms, and nothing tied the shotgun to his alleged threats at the scene of the traffic stop.

Furthermore, the search warrant also failed the particularity requirement, because it authorized seizure materials protected by the First Amendment, but failed to describe them with "the most scrupulous exactitude." *Stanford, at* 485. Specifically, the warrant authorized the police to search for and seize "any written or electronic devices [sic] or media…" This allowed police to rummage through a broad range of items protected by the First Amendment, including any written material, computer files, or other electronic media. The only limitation imposed on

[11] Mr. Burdette could not be forced to surrender his firearms except by court order as specifically provided by the legislature in RCW 9.41.800. The officers' unlawful seizure of the shotgun likely violated Mr. Burdette's constitutional right to bear arms. U.S. Const. Amend. II; Wash. Const. Article I, Section 24.

the items to be seized was that they "contain[]documentation involving threats or plans to assault or kill victims in the incident or law enforcement officers in general." Ex. 2 (admitted 7/27/11).

But documentation of this sort does not constitute a "threat" unless it (1) is communicated to another person, (2) places that person in reasonable fear that the threat will be carried out, and (3) constitutes a "true threat."[12] *State v. Schaler*, 169 Wash.2d 274, 285-288, 236 P.3d 858 (2010). Likewise, "plans" to commit an offense are not themselves criminal, unless the defendant (or a coconspirator), acting with the proper *mens rea*, takes a substantial step toward carrying them out. RCW 9A.28.020; RCW 9A.28.040; *State v. DeRyke*, 149 Wash.2d 906, 910, 73 P.3d 1000 (2003).

Because the warrant failed the probable cause and particularity requirements, the evidence should have been suppressed. *Perrone, at* 545. Mr. Burdette's sentence must be vacated, and the case remanded for a new sentencing hearing, with instructions to exclude the items seized from his home. If Mr. Burdette's conviction is reversed and he is retried, the evidence may not be admitted at his retrial.

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[12] A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *State v. Johnston*, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).

V. MR. BURDETTE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel…." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an

objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach, at* 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

C. If Mr. Burdette's suppression arguments are not preserved for review, he was denied the effective assistance of counsel by his attorney's unreasonable failure to argue the correct grounds for suppression.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence

would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel sought suppression of the evidence, but failed to argue all available grounds for suppression. There was no strategic purpose for counsel's failure to argue all available grounds. Even if counsel wished to focus the court's attention on one or two grounds in particular, he should have included minimal briefing on alternate grounds in his written materials.

Had counsel included all viable arguments, the trial court would likely have suppressed the evidence, for the reasons set forth elsewhere in this brief. This would likely have resulted in a lighter sentence. Accordingly, the failure to argue the proper grounds for suppression prejudiced Mr. Burdette. For all these reasons, defense counsel's failure to argue all available grounds for suppression deprived Mr. Burdette of the effective assistance of counsel. *Saunders, at* 578. His sentence must be vacated and the case remanded. *Id.*

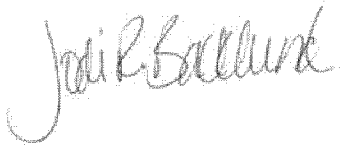
CONCLUSION

For the foregoing reasons, Mr. Burdette's conviction must be reversed and the case remanded for a new trial. All evidence seized from his residence must be suppressed.

If the conviction is not reversed, his sentence must be vacated and the case remanded for a new sentencing hearing, with instructions to exclude any evidence seized from Mr. Burdette's residence.

Respectfully submitted on February 8, 2012,

BACKLUND AND MISTRY



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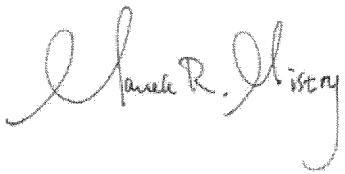

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Wayne Burdette
Lewis County Jail
28 SW Chehalis Ave.
Chehalis, WA 98532

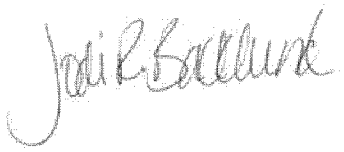
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 8, 2012.



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